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U.S. Department of Homeland Security
U.S. Citizenship and Immigration Services
Administrative Appeals Office (AAO)
20 Massachusetts Ave., N.W., MS 2090
Washington, DC 20529-2090

U.S. Citizenship and Immigration Services

B5

[redacted]

DATE: FEB 15 2012

OFFICE: TEXAS SERVICE CENTER

FILE: [redacted]

IN RE: Petitioner: [redacted]
Beneficiary:

PETITION: Immigrant Petition for Alien Worker as a Member of the Professions Holding an Advanced Degree or an Alien of Exceptional Ability Pursuant to Section 203(b)(2) of the Immigration and Nationality Act, 8 U.S.C. § 1153(b)(2)

ON BEHALF OF PETITIONER:

[redacted]

INSTRUCTIONS:

Enclosed please find the decision of the Administrative Appeals Office in your case. All of the documents related to this matter have been returned to the office that originally decided your case. Please be advised that any further inquiry that you might have concerning your case must be made to that office.

If you believe the law was inappropriately applied by us in reaching our decision, or you have additional information that you wish to have considered, you may file a motion to reconsider or a motion to reopen. The specific requirements for filing such a request can be found at 8 C.F.R. § 103.5. All motions must be submitted to the office that originally decided your case by filing a Form I-290B, Notice of Appeal or Motion, with a fee of $630. Please be aware that 8 C.F.R. § 103.5(a)(1)(i) requires that any motion must be filed within 30 days of the decision that the motion seeks to reconsider or reopen.

Thank you,

Perry Rhew
Chief, Administrative Appeals Office

DISCUSSION: The employment-based immigrant visa petition was denied by the Director, Texas Service Center (Director). The petitioner filed a motion to reopen, which was denied by the Director. The matter is now on appeal before the Chief, Administrative Appeals Office (AAO). The appeal will be dismissed.

The petitioner is a counseling services provider to the Hispanic community of Philadelphia. It seeks to permanently employ the beneficiary in the United States as a psychotherapist and to classify her as an advanced degree professional pursuant to section 203(b)(2) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(2).[1] As required by statute, the petition is accompanied by a Form ETA 750, Application for Alien Employment Certification, approved by the United States Department of Labor (DOL).

The Director denied the petition on two grounds: (1) the evidence of record failed to establish that the beneficiary had two years of experience in the "job offered," as required in the labor certification, and (2) the petitioner failed to establish that it had the continuing ability to pay the proffered wage to the beneficiary. In denying the petitioner's motion to reopen, the Director stated that the additional documentation submitted in support of the motion was insufficient to overcome the grounds for denial. In addition, the Director found that the motion was not timely filed and deniable on this basis as well.

The record shows that the appeal is properly filed and timely and makes specific allegations of error in law and fact. The procedural history of this case is documented in the record and incorporated into the decision. The AAO conducts appellate review on a *de novo* basis. *See Soltane v. DOJ*, 381 F.3d 143, 145 (3d Cir. 2004). The AAO considers all pertinent evidence in the record, including new evidence properly submitted on appeal.[2]

Upon review of the record, the AAO determines that the petitioner's motion to reopen was filed 33 days after the date of the decision and was therefore timely filed in accordance with the regulations at 8 C.F.R. §§ 103.3(a)(2)(i) and 103.5a(b). The Director's finding that the motion was late filed will therefore be withdrawn.

The AAO will now consider the substantive grounds for the Director's denial of the petition.

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[1] The regulation at 8 C.F.R. § 204.5(k)(2) defines "advanced degree" as follows:

> *Advanced degree* means any United States academic or professional degree or a foreign equivalent degree above that of baccalaureate. A United States baccalaureate degree or a foreign equivalent degree followed by at least five years of progressive experience in the specialty shall be considered the equivalent of a master's degree. If a doctoral degree is customarily required by the specialty, the alien must have a United States doctorate or a foreign equivalent degree.

[2] The submission of additional evidence on appeal is allowed by the instructions to the Form I-290B, which are incorporated into the regulations at 8 C.F.R. § 103.2(a)(1). The record in the instant case provides no reason to preclude consideration of any of the documents submitted on appeal. *See Matter of Soriano*, 19 I&N Dec. 764 (BIA 1988).

To be eligible for approval as an advanced degree professional, a beneficiary must have all the education, training, and experience specified on the labor certification as of the petition's priority date. *See Matter of Wing's Tea House*, 16 I&N 158 (Act. Reg. Comm. 1977). The priority date is the date the labor certification application was accepted for processing by the DOL. *See* 8 C.F.R. § 204.5(d).[3] In this case, the priority date is February 12, 2004.

Based on the documentation submitted in support of the motion, in addition to other evidence already in the record, the AAO determines that the beneficiary had the two years of experience specified on the Form ETA 750 to qualify for the proffered position as of the priority date. Specifically, the record establishes that the beneficiary was employed by Comprehensive Medical Services in Philadelphia as a psychotherapist for approximately two and a half years from May 2000 to December 2002. Accordingly, the Director's finding that the beneficiary did not have the requisite work experience as of the priority date (February 12, 2004) will also be withdrawn.[4]

The remaining issue on appeal is whether the petitioner has established its ability to pay the proffered wage. The regulation at 8 C.F.R. § 204.5(g)(2) states as follows:

> *Ability of prospective employer to pay wage.* Any petition filed by or for an employment-based immigrant which requires an offer of employment must be accompanied by evidence that the prospective United States employer has the ability to pay the proffered wage. The petitioner must demonstrate this ability at the time the priority date is established and continuing until the beneficiary obtains lawful permanent residence. Evidence of this ability shall be either in the form of copies of annual reports, federal tax returns, or audited financial statements.

In this case, the petitioner states in the labor certification (Form ETA 750, Part A, Box 12) that the "rate of pay" for the psychotherapist position is $35,000 per year. The beneficiary states in the labor

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[3] If the petition is approved, the priority date is also used in conjunction with the Visa Bulletin issued by the Department of State to determine when a beneficiary can apply for adjustment of status or for an immigrant visa abroad.

[4] The Director did not discuss the issue of the beneficiary's educational qualification for the proffered position. Part A, Box 15, of the Form ETA 750 states that an "M.D. degree or equivalent" is required. The evidence of record includes photocopies of the beneficiary's academic record showing that she received a *Doctor en Medicina* (Doctor of Medicine) from the Autonomous University of Santo Domingo, in the Dominican Republic, on February 28, 1993, following 12 semesters of coursework and a rotational internship. According to the Electronic Database for Global Education (EDGE), created by the American Association of Collegiate Registrars and Admissions Officers (AACRAO), a "Doctor en Medicinal" in the Dominican Republic is awarded upon completion of combined Bachelor-Master-Doctoral level studies of approximately six years duration and is comparable to a first professional degree in the United States. Assuming the authenticity of the beneficiary's academic credentials, the AAO concludes that she would have the requisite education for the proffered position under the terms of the labor certification.

certification (Form ETA 750, Part B, Box 15) that she began working for the petitioner as a psychotherapist in January 2003.

The petitioner must establish that its job offer to the beneficiary is a realistic one. Because the filing of a Form ETA 750 establishes a priority date for any immigrant petition later based on that document, the petitioner must establish that the job offer was realistic as of the priority date and that the offer remained realistic for each year thereafter, until the beneficiary obtains lawful permanent residence. The petitioner's ability to pay the proffered wage is an essential element in evaluating whether a job offer is realistic. *See Matter of Great Wall*, 16 I&N Dec. 142 (Acting Reg. Comm. 1977); *see also* 8 C.F.R. § 204.5(g)(2). In evaluating whether a job offer is realistic, U.S. Citizenship and Immigration Services (USCIS) requires the petitioner to demonstrate financial resources sufficient to pay the beneficiary's proffered wages, although the totality of the circumstances affecting the petitioning business will be considered if the evidence warrants such consideration. *See Matter of Sonegawa*, 12 I&N Dec. 612 (Reg. Comm. 1967).

In his decision denying the petition, dated February 12, 2009, the Director found that the petitioner had not established its continuing ability to pay the proffered wage in accordance with the requirement set forth in 8 C.F.R. § 204.5(g)(2). Focusing on the four-year time period of 2004-2007, the Director found that the documentation of record did establish the petitioner's ability to pay in the years 2005 and 2007, but not in the years 2004 and 2006. Thus, the years 2004 and 2006 are at issue in this appeal.

In determining the petitioner's ability to pay the proffered wage in 2004 and 2006, the AAO first examines whether the petitioner employed and paid the beneficiary in those years. If the petitioner establishes by documentary evidence that it employed the beneficiary at a salary equal to or greater than the proffered wage, the evidence will be considered *prima facie* proof of the petitioner's ability to pay the proffered wage. The record includes a Form 1099-MISC for the year 2004 showing that the petitioner paid the beneficiary $13,855 that year. There is no documentation of any compensation to the beneficiary in 2006.[5] Thus, the petitioner has not established its ability to pay the proffered wage in 2004 and 2006 by its actual compensation to the beneficiary in those years.

As an alternate means of determining the petitioner's ability to pay the proffered wage, the AAO examines the net income figures reflected on the petitioner's federal income tax returns, without consideration of depreciation or other expenses. *See River Street Donuts, LLC v. Napolitano*, 558 F.3d 111 (1st Cir. 2009); *Taco Especial v. Napolitano*, 696 F.Supp. 2d 873 (E.D. Mich. 2010), aff'd, No. 10-1517 (6th Cir. Filed Nov. 10, 2011). Reliance on federal income tax returns as a basis for determining a petitioner's ability to pay the proffered wage is well established by judicial precedent. *See Elatos Restaurant Corp. v. Sava*, 632 F. Supp. 1049, 1054 (S.D.N.Y. 1986) (*citing Tongatapu Woodcraft Hawaii, Ltd. v. Feldman*, 736 F.2d 1305 (9th Cir. 1984)); *see also Chi-Feng Chang v. Thornburgh*, 719 F. Supp. 532 (N.D. Texas 1989); *K.C.P. Food Co., Inc. v. Sava*, 623 F. Supp. 1080 (S.D.N.Y. 1985); *Ubeda v. Palmer*, 539 F. Supp. 647 (N.D. Ill. 1982), *aff'd*, 703 F.2d 571 (7th Cir.

[5] The record includes the following additional evidence of compensation to the beneficiary: a Form 1099-MISC for the year 2007, a Form W-2, Wage and Tax Statement, for the year 2008, and two earnings statements in February 2009. The documentation for 2008 and 2009 shows that the beneficiary was being compensated in those two years at an annual salary in excess of the proffered wage.

1983). Reliance on the petitioner's wage expense is misplaced. Showing that the petitioner's gross receipts exceeded the proffered wage is insufficient. Similarly, showing that the petitioner paid wages to all of its employees in excess of the proffered wage to the beneficiary is insufficient.

In *K.C.P. Food Co., Inc. v. Sava*, 623 F. Supp. at 1084, the court held that the Immigration and Naturalization Service, now USCIS, had properly relied on the petitioner's net income figure, as stated on the petitioner's corporate income tax returns, rather than the petitioner's gross income. The court specifically rejected the argument that USCIS should have considered income before expenses were paid rather than net income. *See Taco Especial v. Napolitano*, 696 F. Supp. 2d at 881 (gross profits overstate an employer's ability to pay because it ignores other necessary expenses).

With respect to depreciation, the court in *River Street Donuts* noted:

> The AAO recognized that a depreciation deduction is a systematic allocation of the cost of a tangible long-term asset and does not represent a specific cash expenditure during the year claimed. Furthermore, the AAO indicated that the allocation of the depreciation of a long-term asset could be spread out over the years or concentrated into a few depending on the petitioner's choice of accounting and depreciation methods. Nonetheless, the AAO explained that depreciation represents an actual cost of doing business, which could represent either the diminution in value of buildings and equipment or the accumulation of funds necessary to replace perishable equipment and buildings. Accordingly, the AAO stressed that even though amounts deducted for depreciation do not represent current use of cash, neither does it [sic] represent amounts available to pay wages.
>
> We find that the AAO has a rational explanation for its policy of not adding depreciation back to net income. Namely, that the amount spent on a long term tangible asset is a "real" expense.

River Street Donuts at 118. "[USCIS] and judicial precedent support the use of tax returns and the *net income figures* in determining petitioner's ability to pay. Plaintiffs' argument that these figures should be revised by the court by adding back depreciation is without support." *Chi-Feng Chang* at 537 (emphasis added).

Consistent with its prior adjudications, and backed by federal court rulings, the AAO will not consider depreciation in examining the petitioner's net income.

As shown in its federal income tax returns for 2004 and 2006 (Form 1120-A, U.S. Corporation Short Form Income Tax Return), the petitioner's net income those two years (Line 24) was as follows:

2004:	$ - 1,782
2006:	$ 21,735

Thus, net income in 2006 was $13,265 below the proffered wage of $35,000. For 2004, even after reducing to $21,145 the amount of net income needed to cover the proffered wage (to supplement the $13,855 that was paid to the beneficiary that year), the petitioner's shortfall was nearly $23,000.

Accordingly, the petitioner cannot establish its ability to pay the proffered wage in 2004 and 2006 based on its net income in those years.

As another alternate means of determining the petitioner's ability to pay the proffered wage, the AAO reviews the petitioner's net current assets as reflected on its federal income tax return. Net current assets are the difference between the petitioner's current assets and current liabilities.[6] On the Form 1120-A year-end current assets are shown in Part III, lines 1 through 6. Its year-end current liabilities are shown in Part III, lines 13 and 14. If the total of a corporation's end-of-year net current assets and the wages paid to the beneficiary (if any) are equal to or greater than the proffered wage, the petitioner is expected to be able to pay the proffered wage using those net current assets.

As shown in its federal income tax returns (Forms 1120-A) for the years 2004 and 2006, the petitioner's net current assets were as follows:

2004:	$ 1,108
2006:	$34,938

Thus, net current assets in 2006 were slightly below the proffered wage of $35,000. As for 2004, even after adding $13,855 to net current assets to account for the wages paid to the beneficiary that year, the resulting sum of $14,963 was more than $20,000 short of the proffered wage. Accordingly, the petitioner cannot establish its ability to pay the proffered wage in 2004 and 2006 based on its net current assets in those years.

Based on the foregoing analysis, the AAO determines that the petitioner has not established its ability to pay the beneficiary the proffered wage in 2004 or 2006 on the basis of either its net income or its net current assets or the compensation it actually paid to the beneficiary in those years.

In addition to the foregoing criteria, USCIS may also consider the totality of circumstances, including the overall magnitude of business activities, in determining the petitioner's ability to pay the proffered wage in 2004 and 2006. *See Matter of Sonegawa,* 12 I&N Dec. 612.[7] As in

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[6] According to *Barron's Dictionary of Accounting Terms* 117 (3rd ed. 2000), "current assets" consist of items having (in most cases) a life of one year or less, such as cash, marketable securities, inventory and prepaid expenses. "Current liabilities" are obligations payable (in most cases) within one year, such accounts payable, short-term notes payable, and accrued expenses (such as taxes and salaries). *Id.* at 118.

[7] The petitioning entity in *Sonegawa* had been in business for over 11 years and routinely earned a gross annual income of about $100,000. During the year in which the petition was filed in that case, the petitioner changed business locations and paid rent on both the old and new locations for five months. There were large moving costs and also a period of time when the petitioner was unable to do regular business. The Regional Commissioner determined that the petitioner's prospects for a resumption of successful business operations were well established. The petitioner was a fashion designer whose work had been featured in *Time* and *Look* magazines. Her clients included Miss Universe, movie actresses, and society matrons. The petitioner's clients had been included in the

Sonegawa, USCIS may, at its discretion, consider evidence relevant to the instant petitioner's financial ability that falls outside of its net income and net current assets. USCIS may consider such factors as the number of years the petitioner has been doing business, the established historical growth of the petitioner's business, the petitioner's reputation within its industry, the overall number of employees, whether the beneficiary is replacing a former employee or an outsourced service, the amount of compensation paid to officers, the occurrence of any uncharacteristic business expenditures or losses, and any other evidence that USCIS deems relevant to the petitioner's ability to pay the proffered wage in 2007.

In this case, the petitioner indicates that it is a not-for-profit corporation that receives some funding from the Commonwealth of Pennsylvania, but is primarily dependent for its financial sustenance on fees for the services it provides. The petitioner states that its business was established in 1998 and had 30 employees at the time the instant petition was filed in 2007. The federal income tax returns in the record show that the petitioner's gross receipts were $600,115 in 2004, $1,581,658 in 2005, $1,682,788 in 2006, and $1,990,276 in 2007. Thus, the petitioner's business volume grew appreciably over that four-year period. However, its net income over that four-year period was largely stagnant – going from -$1,782 in 2004, up to $42,031 in 2005, then down to $21,735 in 2006 and $15,818 in 2007. The petitioner's profit margin was thin – and well below the proffered wage in three years out of four.

Counsel cites a letter from a certified public accountant, [redacted] dated March 16, 2009, who asserts that the petitioner's federal income tax returns "are prepared on the cash basis of accounting" and thus would not record any of its accounts receivable. According to [redacted] the petitioner would have had accounts receivable "in excess of $150,000" at the end of both 2004 and 2006. [redacted] offers no documentary evidence for this claim. Going on record without supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings. *See Matter of Soffici*, 22 I&N Dec. 158, 165 (Comm'r 1998) (citing *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg'l Comm'r 1972)).

Counsel also cites photocopies of two bank statements from the [redacted] in Philadelphia, dated January 31, 2005 and January 31, 2007. These statements show that the petitioner's year-end balance in its business checking account was $21,763.31 as of December 31, 2004, and $34,839.33 as of December 31, 2006. Counsel cites "credits" of $56,646.69 as of December 31, 2004, and $132,767.33 as of December 31, 2006, as evidence of the petitioner's ability to pay the proffered wage in 2004 and 2006. These sums, however, were actually the "deposits and other credits" to the account in January 2005 and January 2007, respectively, which were more than offset by "checks and other debits" against the account of $76,743.74 in January 2005 and $160,850.78 in January 2007. That left account balances of just $1,641.26 on January 31, 2005, and $6,756.21 on January 31, 2007. What these figures appear to show is that the petitioner's business account does not maintain a consistently high balance. Rather, it ebbs and flows depending on the income and expenses of a given month. Had money been deducted from the account to pay the beneficiary the

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lists of the best-dressed California women. The petitioner lectured on fashion design at design and fashion shows throughout the United States and at colleges and universities in California. The Regional Commissioner's determination in *Sonegawa* was based in part on the petitioner's sound business reputation and outstanding reputation as a couturiere.

balance due on the proffered wage in December 2004 ($21,145) or the full amount of the proffered wage in December 2006 ($35,000), there would not have been enough money left in the account to cover all of the expenditures recorded in January 2005 and January 2007. Thus, counsel's claim that "credits" to the bank account in January 2005 and January 2007 could have been used to pay the proffered wage to the beneficiary in December 2004 and December 2006 is faulty.

In short, the petitioner's reliance upon the bank statements is misplaced. Bank statements are not among the three types of evidence listed in 8 C.F.R. § 204.5(g)(2) – annual reports, federal tax returns, or audited financial statements – required to demonstrate a petitioner's ability to pay a proffered wage. While the regulation allows for additional materials "in appropriate cases," the limited number of bank statements submitted by the petitioner in this proceeding show the account balance on a few dates, but do not show the sustainable ability of the petitioner to pay the proffered wage. No evidence was submitted to demonstrate that the funds reported on the petitioner's bank statements of January 2005 and January 2007 reflect additional funds that were not accounted for in its tax returns – such as in taxable income (income minus deductions), or the cash listed in Part III, line 1 of the Forms 1120-A that was considered in determining net current assets.

The AAO notes that the petitioner's net current assets in 2006 were only $62 below the proffered wage. The bank statement from [redacted] in Philadelphia, dated January 31, 2007, shows that the petitioner had an account balance of $34,839.33 on December 31, 2006. Considering how close the petitioner came to paying the full proffered wage in 2006 and the magnitude of the year-end balance in this business account, it could be argued that the petitioner might have utilized bank account funds to pay the beneficiary the modest balance of $62.00. However, the beneficiary in this proceeding was not the only individual for whom the petitioner needed to establish its ability to pay a proffered wage in 2006. The record shows that another Form I-140 petition – filed on behalf of [redacted] on July 11, 2007 [redacted] and approved by the Texas Service Center on June 6, 2008 – had a priority date of November 15, 2004. Thus, the petitioner had to demonstrate its ability to pay the applicable proffered wage to that individual as well in 2006. Indeed, the petitioner had to establish its continuing ability to pay both proffered wages from November 15, 2004, the priority date of [redacted] to June 18, 2008, the date she became a legal permanent resident according to USCIS records.

On September 12, 2008, the Director issued a Request for Evidence (RFE) in which, among other things, the petitioner was advised that it must establish its ability to pay the proffered wage of every potential beneficiary until they obtain permanent resident status. The Director requested a list by receipt number of all I-140 petitions filed by the petitioner in 2007, the proffered wage of each beneficiary, and evidence of the wages paid to those beneficiaries in 2006 and 2007. In its response to the RFE, submitted October 15, 2008, the petitioner acknowledged the petition it filed on behalf of [redacted] and its approval by USCIS.[8] The petitioner referred the Director to the file of [redacted] for evidence of its ability to pay the proffered wage to that beneficiary, which was non-responsive to the Director's request for specific items of evidence. The petitioner is responsible for building a complete record for each and every beneficiary whose services it seeks in immigrant

[8] USCIC records confirm that this was the only other immigrant visa petition (Form I-140) the petitioner filed in 2007, or in any other year from 2003 up to the present.

visa petitions. The failure to submit requested evidence that precludes a material line of inquiry shall be grounds for denying the petition. *See* 8 C.F.R. § 103.2(b)(14).

Based on the foregoing analysis of the evidence, the AAO concludes that the petitioner has failed to establish that the totality of its circumstances, as in *Sonegawa*, demonstrates its ability to pay the proffered wage to the beneficiary in this proceeding in 2004 or 2006.

For all of the reasons discussed herein, the AAO determines that the petitioner has failed to establish its continuing ability to pay the proffered wage of the subject psychoanalyst position from the priority date (February 12, 2004) up to the present. Accordingly, the petition cannot be approved.

The burden of proof in these proceedings rests solely with the petitioner. *See* section 291 of the Act, 8 U.S.C. § 1361. The petitioner has not met that burden.

ORDER: The appeal is dismissed.